IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CLAES and KATHY EKLUND, Appellants, v. SAN JUAN COUNTY, and PAUL and CHERYL WALTON, Respondents.	)	No. 56902-3-I DIVISION ONE UNPUBLISHED OPINION FILED: September 25, 2006

AGID, J. -- The Waltons got a building permit to build a single family home that allowed them to repair and maintain an historic access cut and ramp located on their property. The San Juan County Permit Center (Permit Center) later determined the work the Waltons did was beyond the scope of their permit. San Juan County (County) and the Waltons agreed the Waltons could submit a restoration plan rather than applying for additional permits. The Eklunds appealed the County's decision, arguing they were harmed because without a conditional use permit they could not gain access to a barge loading facility they asserted was located on the Waltons' property. The Eklunds appealed to the Hearing Examiner who dismissed the appeal for lack of standing because they were not an aggrieved party. The superior court dismissed their appeal from the Hearing Examiner's ruling on the same grounds. The Eklunds

challenge the superior court's ruling, arguing they were aggrieved by the County's decision because they do not have access to a barge loading facility.

The Eklunds lack standing because they did not present evidence that they will suffer immediate, concrete, and specific injury from the County's decision to allow the Waltons to restore the access cut and ramp and rather than apply for a conditional use permit and build a barge landing facility. The Waltons' decision to restore their property and not build a barge loading facility was their choice as property owners, and neither the County nor the court could require them to build something different.

We affirm.

FACTS

The Eklunds and the Waltons own property on Henry Island, which is not served by ferries. Under the San Juan County Shoreline Master Program, barge landing sites and facilities require a conditional use permit. In 1998 the Eklunds applied for a conditional use permit and a shoreline substantial development permit to construct a barge landing and joint-use dock on land they owned with Sara Hart. The Shoreline Hearings Board approved a joint-use dock but denied the Eklunds' applications for the access cut and barge landing.[1] They appealed, but the Thurston County Superior Court upheld the Board.[2]

On September 9, 2000, the Waltons got a building permit from the Permit Center to build a single family home on their Henry Island property. This permit allowed limited work to a pre-existing access cut and ramp located on the property. The permit

[1] Eklund v. San Juan County et al., SHB 99-029.
[2] Thurston County Cause No. 00-2-00613-3.

contained the following handwritten term:

> The 'exit ramp to beach (to be rocked)' may be cleared of vegetation & rock base added. No expansion of the existing ramp may occur without a shoreline permit. Erosion control measures pursuant to Section 6.6 UDC shall be provided.[3]

The Waltons appealed this decision and the Eklunds intervened, but the Waltons withdrew their appeal before it reached the Hearing Examiner.

On August 2, 2001, the Permit Center staff visited the Walton property and decided their work on the access cut and ramp exceeded the scope of their building permit and was more extensive than would be allowed without a shoreline permit. On August 17, 2001, the Director of the San Juan County Permit Center issued a Notice of Violation, notifying the Waltons that their expansion of the access cut and ramp violated SJCC 18.50 (the San Juan County Shoreline Master Program), RCW 90.58 (Shoreline Management Act of 1971), and WAC 173-27. The Notice ordered the Waltons to either restore the access cut to its pre-project condition or apply for the proper permits and approvals to construct a new access cut to the shoreline. Around that time, the Eklunds asked the Department of Ecology (DOE) to take action against the Waltons. At DOE's request, the County sent a letter to the Eklunds' attorney on October 12, 2001, explaining that the Walton ramp could not function as a barge landing under the county code without a conditional use permit and the physical contours of the site could not be enlarged without a substantial development permit.

DOE supported the County's position in a letter dated November 20, 2001. DOE stated it did not have a basis to decide that the County clearly erred in its decision to

[3] UDC stands for San Juan County's Unified Development Code.

allow the Waltons to improve the pre-existing access cut and ramp through a repair and maintenance exemption because adding a rock substrate to the cut, without changing the contours of the ground, fell within the scope and intent of the applicable WAC regulations. They said a substantial development permit could be required to place substrate material if the work were part of a new use as a private access road. DOE also stated the Waltons could temporarily land material to build their home without creating a barge landing site by the County's definition. Thus, no conditional use permit was required. It also stated "[e]ven if the County had required a shoreline permit for a private access road, there is still no nexus for requiring year-round joint use."

On October 26, 2001, the County suspended the Waltons' building permit for their home. The Waltons chose to cure their violation by restoring the area rather than applying for a permit under the Shoreline Master Program. On February 3, 2004, they sent a letter to the Director of the San Juan County Community Development and Planning Department outlining a restoration plan for the access cut. The County informed the Waltons their original building permit was exempt from the shoreline permit requirements so long as they did not expand or excavate in the vicinity of the existing ramp, work below the ordinary high water mark, or use the access cut for purposes other than building a single family residence. Any more intensive use would, the Director said, constitute a barge landing under the County Shoreline Master Program and require a conditional use permit.

On May 7, 2004, the San Juan County Prosecutor's office agreed to the following proposed terms of the restoration plan: (1) return the fill dirt to the access cut

and restore its surface grade to within six inches of its original profile, (2) restore the original grade, width and elevation of the surface access road by adding six inches of rock, (3) revegetate the side banks' bare slopes with native plants and grasses, according to the planting plan approved by the Department of Community Development and Planning, and (4) not work seaward of the original high water mark. On August 2, 2004, the Permit Center informed the Waltons it would reinstate their building permit once the restoration was complete and approved by the Department.

The Eklunds appealed the August 2, 2004 letter to the San Juan County Hearing Examiner's office, arguing the Permit Center erred when it decided to lift the Waltons' building permit suspension and authorize construction without a shoreline conditional use permit. The Hearing Examiner dismissed the Eklunds' appeal on October 29, 2004, making four findings:

> (1) The Walton's [sic] were authorized by the County to perform repair and maintenance of a historic access cut on their property with the issuance of a residential building permit on September 8, 2000. The effect was to determine that the work involved was exempt from shoreline permit requirements.
> (2) On August 17, 2001, the County issued a Notice of Violation to the Waltons. The Notice stated that the Waltons had violated the terms of the shoreline exemption issued as part of the building permit by expanding the access cut. The Notice ordered the Waltons to restore the access cut to its pre-project conditions or apply for required shoreline permits.
> (3) The County suspended the Waltons building permit pending the outcome of the enforcement action on the access cut.
> (4) The Waltons chose to restore the cut and ultimately submitted a restoration plan. The letter which has been appealed simply approved the plan.

The Examiner concluded the Eklunds lacked standing because the August 2, 2004 letter to the Waltons was part of an enforcement proceeding by prosecuting authorities that was beyond his authority to review and not subject to appeal by private parties.[4]

He also concluded the time to appeal the shoreline exemption had passed long before the Eklunds filed their appeal because the appeal had to be filed within 21 days of the date on which the decision was made.

The Eklunds appealed the Hearing Examiner's decision to the Board of County Commissioners. On December 14, 2004, after reviewing the record and hearing the arguments of both parties, the Board affirmed the Hearing Examiner. The Eklunds then appealed to the San Juan County Superior Court. The trial court dismissed the Eklunds' appeal. The court ruled they did not have standing to appeal to the Hearing Examiner or to bring a petition under the Land Use Petition Act (LUPA), RCW

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[4] The Hearing Examiner's Conclusions of Law also included the following:

(1) The Hearing Examiner's authority is limited to the powers he is specifically granted by the legislative authority. As San Juan County's ordinances spell it out, that role is primarily related to whether applications for project permits should be granted or denied.

(2) . . . a decision to exempt an action from shoreline permit requirements can come before the Hearing Examiner only if it is timely appealed. . . .

. . . .

(6) The enforcement chapter also creates a system of Notices of Violation whereby persons are informed of violations and ordered to take corrective action. Stop Work Orders may be issued as well. The system is designed to encourage voluntary compliance. Mutually agreeable compliance plans are explicitly contemplated as a part of the scheme. See SJCC 18.100.010, 18.100.040, 18.100.050.

(7) No place in any of these enforcement provisions is any reference made to the Hearing Examiner. He does not appear to have any role in this aspect of the shoreline management process. The conclusion, therefore, is that the Examiner has no authority to entertain appeals of enforcement order.

(8) Moreover, the enforcement function is given solely to public officials. There is no provision for enforcement by private citizens. There is certainly nothing in Chapter 18.100 SJCC to suggest that private citizens have the right to intervene in enforcement proceedings and attempt to second-guess the enforcement decisions made [by] the public officials.

(9) Citizens are explicitly granted the power to act as private attorneys general in some statutes, but there is no grant of such power nor is there any basis for inferring such power in connection with local shorelines enforcement under the Shoreline Management Act. The act expressly provides that private parties may bring suits for damages arising from shoreline violations, but that is the extent of the private enforcement authority granted RCW 90.58.230.

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36.70C.060.

ANALYSIS

The Shoreline Management Act (SMA), chapter 90.58 RCW, requires each local government to develop a master program governing shorelines within its jurisdiction.[5] The SMA mandates that shoreline development in Washington be consistent with the policies of the SMA and the local government's master program.[6] RCW 90.58.140 requires local governments to establish a program to administer and enforce a permit system for substantial developments within shorelines.[7]

San Juan County adopted a Shoreline Master Program (Master Program) as part of its Unified Development Code (UDC).[8] The UDC was adopted to implement the goals and policies of the San Juan County Comprehensive Plan, which governs all land use development in San Juan County.[9] The Master Program limits shoreline use and specifies criteria for issuing development permits within County shorelines.[10]

An appellate court reviews agency decisions based on the record before the administrative tribunal, including its findings of fact and conclusions of law.[11] An

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[5] RCW 90.58.080; Weyerhaeuser Co. v. King County, 91 Wn.2d 721, 729, 592 P.2d 1108 (1979).

[6] "Master program shall mean the comprehensive use plan for a described area, and the use regulations together with maps, diagrams, charts, or other descriptive material and text, a statement of desired goals, and standards developed in accordance with the policies enunciated in RCW 90.58.020." RCW 90.58.030(3)(b).

[7] RCW 90.58.140(2)(b); Weyerhaeuser, 91 Wn.2d at 729.

[8] SJCC 168.50.

[9] "This code is a principal tool for implementing the goals and policies of the San Juan County Comprehensive Plan, pursuant to the mandated provisions of the State of Washington's Growth Management Act (Chapter 36.70A RCW), Shoreline Management Act (Chapter 90.58 RCW), Subdivisions Code (Chapter 58.17 RCW), State Environmental Policy Act (Chapter 43.21C RCW), and other applicable state and local laws." SJCC 18.10.020(A).

[10] SJCC 18.50.020(A).

[11] RCW 36.70.130(1); HJS Dev., Inc. v. Pierce County, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003) (When reviewing a superior court's decision on a land use petition, the appellate court reviews administrative decisions on the record of the administrative tribunal, not of the

appellate court accords "deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues."[12] In reviewing issues of law, we may reverse an administrative tribunal's decision if it "engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure; . . . [or] has erroneously interpreted or applied the law[.]"[13] The burden of demonstrating that an administrative tribunal misinterpreted or misapplied the law rests with the party asserting the error.[14]

The Eklunds argue the Hearing Examiner erred by dismissing their claim. They assert they were aggrieved by the Permit Center's August 2, 2004 decision to allow the Waltons to continue to work on the site without a conditional use permit. Their argument is that because the Permit Center denied their conditional use permit for a barge loading facility on the ground that a possible access point existed on the Waltons' property, allowing the Waltons to continue work without a conditional use permit prevents them from gaining access for their own home-building project. They also contend the Hearing Examiner erred by finding that the Permit Center's August 2, 2004 letter allowed the Waltons to restore the cut rather than obtain a conditional use permit because the scope of the Waltons' work exceeded the scope of work permitted in the shoreline without a conditional use permit. Finally, they assert the Hearing Examiner erred when he made his findings without a hearing.

The Waltons contend the Eklunds have brought this series of appeals simply to

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superior court, to determine whether a land use decision was supported by fact and law.).

[12] City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

[13] RCW 34.05.570(3)(c), (d).

[14] RCW 34.05.570(1)(a).

gain access to their property. They argue the Hearing Examiner did not err because the Eklunds cannot claim a legally protected interest, and their work on the site falls within an exemption to the County's requirement for a conditional use permit. They also argue the Eklunds were not injured by the County's decision to allow them to correct their violation rather than applying for a conditional use permit.[15]

The County argues the Eklunds did not have standing to appeal to the Hearing Examiner because they are not an aggrieved party under the UDC or LUPA. It asserts that the Eklunds are not injured by their inability to access the Waltons' property as a barge landing facility because neither the County nor the court can require the Waltons to build such a use on their property. The Waltons' cut was historic and thus exempt from the conditional use permit requirement unless it was expanded into a barge landing facility. The County asserts that its restoration agreement with the Waltons does not injure the Eklunds because the Waltons alone could choose whether to restore the site or continue the expansion and apply for a conditional use permit. Finally, the County argues the Eklunds provide no authority for the proposition that the Hearing Examiner could not base his findings of fact on a written record.

Under SJCC 18.80.140(d), the Eklunds had standing to appeal the administrative decision if they were an "aggrieved person." An "aggrieved person" is a term of art in the Administrative Procedures Act (APA), RCW 34.05.530, the State Environmental Policy Act, RCW 43.21C.075(4), and under LUPA. The court in

[15] The Waltons make a number of other arguments which we do not need to address because we agree that the Eklunds lacked standing to appeal.

Suquamish Indian Tribe v. Kitsap County considered the injury-in-fact requirement in the context of a LUPA appeal and held that the standing language in LUPA was nearly identical to the standing requirements under the APA.[16] In its analysis, the Suquamish court stated:

> In general, parties owning property adjacent to a proposed project and who allege that the project will injure their property have standing. The courts have denied standing where the petitioner does not allege facts showing that the challenged land use decision would lead to any specific injury. Standing is also lacking when it is unclear that the ultimate land use action will necessarily lead to the impacts alleged by the plaintiff.[17]

We apply traditional standing principles to the arguments the parties raise here. Under these principles, the interest the appealing party seeks to protect must be within the zone of interests designed to be protected or regulated by the statute in question, and the party must allege that the proposed action would result in immediate, concrete, and specific injury.[18] Bare assertions that a land use decision would cause injury are not sufficient to confer standing.[19]

Because the Waltons' ramp was an historic access to their property that predated the Shoreline Management Act, the Permit Center correctly determined that limited repair and maintenance of the cut was exempt from shoreline permit requirements. SJCC 18.50.330(A) exempts the construction of single-family residences from substantial development permit requirements. Normal maintenance and repair of existing structures or developments is also exempt from those requirements.[20] Nothing

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[16] 92 Wn. App. 816, 829-30, 965 P.2d 636 (1998).
[17] Id. at 829-30 (citations omitted).
[18] Suquamish Indian Tribe, 92 Wn. App. at 829.
[19] Trepanier v. City of Everett, 64 Wn. App. 380, 383-84, 824 P.2d 524, review denied, 119 Wn.2d 1012 (1992).
[20] SJCC 18.50.020(F).

in the record suggests that the Permit Center erred when it issued the Waltons' residential building permit on September 8, 2000, with a condition that they repair and improve the pre-existing access cut and ramp. The County addressed the Waltons' violation of their building permit when they issued a Notice and suspended the building permit. The Waltons were then presented with a choice to either restore the site or apply for shoreline and conditional use permits. They chose to restore their property rather than to develop the access cut and apply for additional permits. The Hearing Examiner correctly found that the "Waltons chose to restore the cut and ultimately submitted a restoration plan. The letter which has been appealed simply approved the plan." The letters the Waltons and the County exchanged between February 3 and August 2, 2004, are substantial evidence supporting this finding.

The underlying basis for the Eklunds' injury was the 1998 decision denying their own application to build a barge landing facility on the ground that a barge loading facility could be constructed on the Waltons' property. The Waltons' decision to restore their property foreclosed that possibility, but did it not injure the Eklunds. There is simply no support for their assertion that the Waltons could be required by the court or the County to obtain the permits required for this expansion of their chosen use.

The County's decision to allow the Waltons to submit a restoration plan to correct their building permit violation does not leave the Eklunds without an opportunity to obtain access to a barge landing site. It only addresses what the Waltons may do on their property without a conditional use permit. The Eklunds are not without a remedy. Although their 1998 permit application was denied because a barge landing

facility could be built on the Walton property, the Waltons have now chosen not to do so. Under those circumstances, the Eklunds may reapply for a permit to build their own barge landing facility because the Waltons have chosen not to build a facility that would provide access to multiple users.

Because the Eklunds were not injured by the Waltons' choice to restore their historic access cut and ramp or the County's decision to allow the restoration, the Eklunds lack standing to appeal the County's decision.

The Eklunds argue they had standing to appeal the Hearing Examiner's land use decision under both LUPA and the County's UDC. They assert the court erred by using the LUPA standard that applies to the trial court's review of the Hearing Examiner's decision.

LUPA applies to judicial review of all land use decisions with some exceptions not relevant here.[21] Under LUPA, standing to bring a land use petition is limited to the applicant or property owner and to persons aggrieved or adversely affected by the land use decision. A person is aggrieved or adversely affected when all of the following conditions are present:

> (a) The land use decision has prejudiced or is likely to prejudice that person;
> (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
> (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and
> (d) The petitioner has exhausted his or her administrative remedies to the extent required by law.[22]

[21] RCW 36.70C.010-.030.
[22] RCW 36.70C.060(2).

For the reasons we discussed above, the Eklunds were not an aggrieved party under LUPA because the County's decision to allow the Waltons to restore their property in order to reinstate their building permit did not harm the Eklunds. Even if the County could have required the Waltons to obtain some additional permit for their work, it could not have required them to get a conditional use permit for a barge loading facility. They could have applied for a substantial development permit to make changes to their historic access shoreline cut and still decided not to get the permits necessary to build a barge loading facility. Thus, a judgment in favor of the Eklunds would not have redressed the Eklunds' asserted injury because they would still not have access to a barge landing facility unless they applied for a conditional use permit to build one on their own property. That remedy is unrelated to their appeal to the Hearing Examiner and the court.

The Hearing Examiner found "[t]he County suspended the Waltons[']] building permit pending the outcome of the enforcement action on the access cut." The Eklunds argue this is an error because rather than enforcing the Code, the Permit Center authorized an on-going violation of the UDC. They assert the County failed to take enforcement action against the Waltons and is instead approving a violation of the Shoreline Master Program that harms the Eklunds. They argue that the UDC does not limit their right to appeal this violation to the Hearing Examiner.

The County argues the Eklunds have no authority under state or local law to act as private attorneys general and direct the County's enforcement decisions. They assert that because the Eklunds dismissed their action under the SMA in order to bring

a LUPA appeal, they cannot bring a private action under RCW 90.58.230.

The August 2, 2004 letter to the Waltons which is the subject of this appeal was the Permit Center's response to a Notice issued on August 17, 2001. This Notice arose after the Permit Center inspected the Waltons' building site and notified them that their expansion violated chapter 18.50 SJJC (the San Juan County Shoreline Master Program), RCW 90.58 (Shoreline Management Act of 1971), and WAC 173-27. Under SJCC 18.100.030, the Permit Center is empowered to enforce the code and may call upon law enforcement or any other appropriate County department to assist in this enforcement. That is what they did in this case. The Hearing Examiner correctly found that the "County suspended the Waltons[']] building permit pending the outcome of the enforcement action on the access cut." Rather than authorizing violations of the UDC, the County took appropriate enforcement action to prevent the Waltons from exceeding the scope of their building permit.[23]

We also affirm the Hearing Examiner's conclusion that citizens have no power to interfere with the County's enforcement actions and decisions. The enforcement provision of the UDC, SJCC 18.100.030, specifically authorizes the "administrator" to enforce the code and makes no provision for any other party to do so.[24] The code does not modify the standing requirements of SJCC 18.80.140(d), which limits non-applicants who may appeal to either aggrieved persons or those who submitted written or oral testimony at an open-record predecision hearing or an open-record appeal

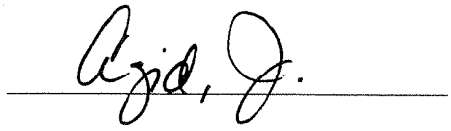
[23] We note that the Eklunds did not appeal the County's decision to issue the underlying permit which allowed the Waltons' limited work on the access cut.

[24] The "administrator" in this context is the San Juan County Permit Center Director or a designated representative. SJCC 18.20.010.

hearing. As we held earlier, the Eklunds do not qualify as either here.

Under the SMA, RCW 90.58.230, private citizens may bring a "suit for damages . . . on their own behalf and on the behalf of all persons similarly situated." Relief under such a suit may include monetary damages and attorney fees and costs of the suit to the prevailing party.[25] But the Eklunds did not sue under this provision. In any event, they are unable to prove they were aggrieved because the Eklunds do not have a right to require the Waltons to apply for a permit they do not want. The Eklunds have not shown the Waltons have harmed them. Their argument is really based on the harm caused by the County's rejection of their 1998 conditional use permit application. The evidence before the Hearing Examiner and the superior court included a determination by the Department of Ecology that the Waltons had not created a barge landing site and thus were not required to allow year round joint use of their private access road. This is substantial evidence that the Waltons and the County have complied with both the SMA and the County's Master Program.

We affirm.



WE CONCUR:

[25] RCW 90.58.230.

Ellington, J. Coleman, J.